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Western Dental Services, Inc. and Jennifer
Roth and Counter-Claimant Western Dental
Services, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

NANCY CAMPOS, an individual, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

WESTERN DENTAL SERVICES, INC. and
JENNIFER ROTH,

Defendants.

Case No. 05-02119 RMW

CLASS ACTION

**MEMORANDUM IN SUPPORT OF
JOINT MOTION FOR APPROVAL
OF CLASS SETTLEMENT**

Judge: Hon. Ronald M. Whyte

Plaintiff Nancy Campos, on behalf of herself and all others similarly situated, and
Defendants Western Dental Services, Inc. and Jennifer Roth have reached an agreement to settle
this matter, brought pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. §§1692 *et seq.*
(hereinafter "FDCPA"), and California's Rosenthal Fair Debt Collection Practices Act, Civil

1 Code § 1788 *et seq.*, ("CA FDCPA"), on a classwide basis and have filed a Joint Motion for the
2 Court's approval pursuant to Rule 23(e).

3 **I. PROCEDURAL HISTORY**

4 Plaintiff Nancy Campos, on behalf of herself and all others similarly situated, filed
5 a complaint against defendants Western Dental Services, Inc. and Jennifer Roth for violations of
6 the FDCPA, on May 24, 2005. Docket # 1.

7 On November 28 , 2005, the Court granted Plaintiff's motion to dismiss
8 Defendants' Counterclaim and denied without prejudice Plaintiff's motion for class certification.
9 Docket # 38. *Campos v. Western Dental Servs.*, 404 F.Supp.2d 1164 (N.D.Cal. 2005).

10 Through a settlement conference with Magistrate Judge Trumbull and subsequent
11 negotiations, the parties have entered into a Stipulation and Class Action Settlement Agreement,
12 Appendix A to the Joint motion, subject to this Court's approval. Pursuant to Rule 23(e) of the
13 Federal Rules of Civil Procedure, the parties request the Court to grant preliminary approval of
14 the proposed class settlement.

15 **II. STATEMENT OF FACTS**

16 Subject to the Court approval, the parties have entered into a Stipulation to settle
17 this proposed class action pursuant to which Defendants Western Dental Services, Inc. and
18 Jennifer Roth have agreed to provide the following consideration to class members:
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- 1 A. \$5,000 to plaintiff Nancy Campos;
- 2 B. For each Settlement Class Member whose debt to Western Dental equals or
- 3 exceeds \$35.00, Western Dental shall cause the amount of that Settlement
- 4 Class Member's debts to be reduced by \$35.00;
- 5 C. For each Settlement Class Member who owes no debt to Western Dental or
- 6 whose debt to Western Dental is less than \$35.00, Western Dental shall
- 7 cause a check to be mailed to that Settlement Class Member in an amount
- 8 equal to the excess of (a) \$35.00, minus (b) the amount of the Settlement
- 9 Class Member's debt to Western Dental, if any.

10 Defendants will also bear the cost of sending notice to the class members and administration of
11 the class.

12 Defendants agree that Plaintiff is entitled to reasonable attorney fees, expenses,
13 and costs to be agreed upon, or if agreement cannot be reached, those attorneys fees, expenses,
14 and costs are to be determined by the Court.

15 III. STATEMENT OF QUESTIONS PRESENTED

16 1. Should the Court grant preliminary approval of the parties' Stipulation and
17 Class Action Settlement Agreement?

18 The parties submit that this question should be answered in the affirmative.

19 IV. ARGUMENT

20 A. This Action May Be Certified As A Class Action For Settlement 21 Purposes.

22 The parties have stipulated, for the purposes of settlement, to a class
23 defined as:

(i) all persons wherever located (ii) to whom defendant Western Dental Services, Inc. sent letters in the form represented by Exhibit B (attached to the Complaint), (iii) which letters were not returned as undelivered by the Post Office, (iv) in connection with attempts to collect debts which are shown by Defendant's records to be primarily for personal, family, or household purposes, (v) during the period between May 24, 2004 and May 24, 2005.

In order for a class to be certified all four requirements of Rule 23(a) must be satisfied along with one of the three categories of Rule 23(b). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2245, 138 L.Ed.2d 689 (1997); *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). The criteria for class certification has been met.

1. Rule 23(a)

a. Numerosity

The prerequisite of numerosity is discharged if the class is so large that joinder of all members is impracticable. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The proposed class consists of approximately 6400 members. Because the amount at stake for each debtor is small, each class member would be reluctant to sue individually. The numerosity requirement of Rule 23(a)(1) has been met.

b. Commonality

A class has sufficient commonality if there are questions of fact and law which are common to the class. *Hanlon v. Chrysler Corp.*, *supra* at 1019. All of the class members were sent a letter in the form of Exhibit B (attached to the complaint) by Western Dental during the applicable time period. This fact is common to all the class members. The common question of law is whether the letters violated the FDCPA and or CA FDCPA.

c. Typicality

1 Rule 23(a)(3) requires that the claims or defenses of the representative party are
2 typical of the claims or defenses of the class. *Hanlon v. Chrysler Corp.*, *supra* at 1020.

3 "Representative claims are 'typical' if they are reasonably co-extensive with those of absent class
4 members; they need not be substantially identical." *Id.* The claims made by Plaintiff is typical
5 of the class Ms. Campos seeks to represent. Western Dental sent each class member the same
6 form letter.

7 **d. Adequacy of Representation**

8 Rule 23(a)(4) requires the named plaintiffs to fairly and adequately protect the
9 interests of the class. Fed. R. Civ.P. 23(a)(4). The plaintiff's counsel must be qualified,
10 experienced and generally able to conduct the proposed litigation. *Connor v. Automated*
11 *Accounts, Inc.*, 2001 U.S. Dist. LEXIS 10458, *9 (E.D.Wash. July 18, 2001). Additionally, the
12 named plaintiff must have no interests antagonistic to the class. *Id.*

13 Mr. Wilcox and Mr. Bragg are qualified, experienced and very able to conduct this
14 litigation. The U.S. District Court for the Northern District of California has stated, "it seems
15 clear that the lead counsel for this lawsuit, O. Randolph Bragg, has been qualified and found
16 competent to represent similar class actions." *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541,
17 545 (N.D.Cal. 2005). Also, see: *Littledove v. JBC & Assocs.*, 2001 U.S. Dist. LEXIS 139, *12
18 (E.D.Cal., Jan. 10, 2001); *Irwin v. Mascott*, 96 F.Supp.2d 968, 978-979 (N.D.Cal. 1999); *Ballard*
19 *v. Equifax Check Services, Inc.*, 186 F.R.D. 589, 595 (E.D.Cal. 1999); *Swanson v. Mid Am, Inc.*,
20 186 F.R.D. 665, 668 (M.D.Fla. 1999) ("The Declaration of O. Randolph Bragg shows Plaintiff's
21 counsel, O. Randolph Bragg, is qualified to conduct class action litigation."). Ms. Campos does
22 not have any interests antagonistic to the class. Therefore, the requirements of Rule 23(a)(4) are
23 satisfied.

24 **2. Rule 23(b)(3)**

25 "To qualify for certification under this subsection, a class must satisfy two
26 conditions in addition to the Rule 23(a) prerequisites: common questions must 'predominate over
27 any questions affecting only individual members,' and class resolution must be 'superior to other
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available methods for the fair and efficient adjudication of the controversy." *Hanlon v. Chrysler Corp.*, *supra* at 1022 (quoting Fed. R. Civ. P. 23(b)(3)).

Defendants have acted in the same manner toward each class member, *i.e.* – the same form letter (Exhibit B attached to the complaint) was sent to each class member.

"Predominance is a test readily met in certain cases alleging consumer . . . fraud. . . ." *Amchem Prods., Inc. v. Windsor*, *supra* 117 S. Ct. at 2250 (citations omitted). Resolution of this matter as a class action is superior to other methods of resolution. In the FDCPA case of *Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589, 600 (E.D.Cal. 1999), the district court stated:

The court finds that a class action in this context is superior to individual claims. First, individual consumers are most likely unaware of their rights under the FDCPA. Class action certification to enforce compliance with consumer protection laws are "desirable and should be encouraged." ... Second, the size of any individual damages claims under the FDCPA are usually so small that there is little incentive to sue individually. ... Third, efficiency and inconsistency of concerns favor litigating the legality of ECS's standardized conduct by all class members in one suit, rather than forcing each class member to sue individually. ...

Thus, the criteria of Rule 23(b)(3) has been satisfied. The Court should grant certification of the class for the purpose of settlement.

B. STANDARD FOR APPROVAL OF A CLASSWIDE SETTLEMENT

The Ninth Circuit has stated the standard for approval of a class settlement as follows:

Fed. R. Civ. P. 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court" Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the "universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 at 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217, 75 L. Ed. 2d 456, 103 S. Ct. 1219 (1983). *See generally* Marc Glanter, *The Federal Rules and the Quality of Settlements*, 137 U.Pa.L.Rev. 1231 (1989).

Class v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). "Rule 23(e) has been interpreted to require the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). See: Manual for Complex Litigation, Fourth §21.63 (Federal Judicial Center 2004).

1 In order for the Court to approve a class action settlement pursuant to Rule 23(e),
 2 the Ninth Circuit requires that the settlement be fundamentally fair. In re Mego Fin. Corp. Sec.
 3 Litig., supra at 454; Class v. City of Seattle, supra at 1276. Pursuant to the proposed settlement,
 4 notice will be mailed to each class member as approved and directed by the Court.

5 The settlement proposed here is fair to all parties and class members. Defendants
 6 Western Dental Services, Inc. and Jennifer Roth have agreed to pay a total of \$5,000 to plaintiff
 7 Nancy Campos and to provide a settlement value of approximately \$225,000 to the class of 6400
 8 members, who will each receive \$35.00 of value, with (a) this amount deducted from any
 9 outstanding balance of the class member to Western Dental or (b) for those who owe less than
 10 \$35.00, a check in an amount equal to the excess of (i) \$35.00, minus (ii) the amount of the
 11 Settlement Class Member's debt to Western Dental, if any paid directly to the class member.
 12 Defendants have also agreed to bear the cost of class notice and administration. Finally,
 13 Defendants have agreed to pay costs, expenses, and attorneys fees as agreed by the parties or
 14 determined by the Court. An award of costs and attorneys fees is available where the consumer is
 15 successful in FDCPA litigation. 15 U.S.C. §1692k(a)(3). Given the structure of the section,
 16 attorney's fees should not be construed as a special or discretionary remedy; rather, the Act
 17 mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should
 18 be enforced by debtors acting as private attorneys general. Zagorski v. Midwest Billing Services,
 19 128 F.3d 1164, 1166-67 (7th Cir. 1997). Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991).
 20 See also DeJesus v. Banco Popular de Puerto Rico, 918 F.2d 232, 235 (1st Cir. 1990).

21 In the Ninth Circuit, prior to final approval, to determine whether a proposed
 22 settlement is fair, reasonable and adequate, a court may consider "some or all" of the following
 23 factors: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely
 24 duration of further litigation; (3) the risk of maintaining class action status throughout the trial;
 25 (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the
 26 proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
 27 participant; and (8) the reaction of the class members to the proposed settlement. Linney v.
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1 *Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998). Indeed, one factor alone may
 2 prove determinative. *Id.* (citing *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir.
 3 1993)). Consideration of these factors lead to the conclusion that preliminary approval the
 4 Settlement should be granted.

5 **1. Strength of Plaintiff's Case**

6 It is undisputed that the form letter attached as Exhibit B to the Complaint was sent
 7 to numerous individuals throughout the United States by Western Dental, and that the letter does
 8 not reflect on its face that Western Dental, and not a private law office, sent the letter. Ms.
 9 Campos contends that this is a clear violation of the FDCPA, 15 U.S.C. §§1692e(3), e(10), and
 10 1692j and California's Rosenthal Fair Debt Collection Practices Act, Civil Code § 1788 *et seq.*,
 11 ("CA FDCPA"). Plaintiff also asserts that Defendants have violated 15 U.S.C. §§1692e(11) and
 12 1692g by failing to provide the validation notice and debt collection warning in Exhibit B.

13 Defendants would present evidence that the letter at issue was only sent after six
 14 earlier letters – all in compliance with law – were sent in an unsuccessful effort to collect an
 15 undisputed debt. Western Dental would also claim that the amounts it is owed far exceed the
 16 maximum allowable recovery under the statutes at issue, and argue it was entitled to an offset
 17 which would result in little or no payment to the class.

18 Plaintiff is confident she will prevail on Defendants' violations of the FDCPA and
 19 the CA FDCPA. However, Defendants may be successful in their claims of setoff and, thereby,
 20 eliminate or grossly reduced a class recovery.

21 **2. Risk, Expense, Complexity and Likely Duration of Further Litigation**

22 There is a substantial risk that the class would receive little or no recovery because
 23 the debts of the class members would be subject to a setoff for the amounts owed Western Dental.
 24 In the aggregate, such a setoff would vastly exceed the cap on statutory damages pursuant to the
 25 FDCPA (\$500,000) and the CA FDCPA (\$500,000). Nor is there any assurance that the Court,
 26 after trial and after consideration of all arguments in mitigation, would award the maximum
 27 amount of statutory damages pursuant to the FDCPA (\$500,000) and pursuant to the CA FDCPA
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1 (\$500,000) . It is anticipated that Western Dental would highlight its status as a dental services
 2 provider that serves underprivileged communities and offer evidence that any violation of the
 3 FDCPA and/or the CA FDCPA was inadvertent. Under those circumstances, there is a strong risk
 4 that, following lengthy and expensive proceedings, little or no compensation would be recovered
 5 for the class.

6 In addition to the risk, complexity and expense associated with the establishment
 7 of liability, statutory damages, and Defendants' claimed setoff, it is clear that continued litigation
 8 would be expensive and would prolong the duration before any possible recovery. The tenacity
 9 displayed by both parties thus far in the litigation strongly suggests that the matter would be
 10 vigorously defended through trial -- and beyond.

11 **3. The Risk of Maintaining Class Action Status Throughout the Trial**

12 Plaintiff's initial motion for class certification was denied without prejudice.
 13 *Campos v. Western Dental Servs.*, 404 F.Supp.2d 1164 (N.D.Cal. 2005). Ms. Campos is
 14 optimistic that her subsequent motion for class certification will be granted and maintained
 15 through trial, but a risk exists that certification could be denied or terminated prior to trial.

16 **4. The Amount Offered in Settlement**

17 After lengthy negotiations and a settlement conference with Magistrate Judge
 18 Trumbull, Defendants have agreed to compensate each of the class members as described above,
 19 for a total value of approximately \$225,000. Class members are not required to submit a claim
 20 form or any proof. Each will receive \$35.00 of value, with (a) this amount deducted from any
 21 outstanding balance of the class member to Western Dental or (b) for those who owe less than
 22 \$35.00, a check in an amount equal to the excess of (i) \$35.00, minus (ii) the amount of the
 23 Settlement Class Member's debt to Western Dental, if any paid directly to the class member.

24 **5. The Extent of Discovery Completed and the Stage of the Proceedings**

25 The parties have exchanged written discovery. Depositions have not yet been
 26 taken.
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1 The complaint in this action was filed May 24, 2005. Prior to an agreement to
 2 settle this litigation, the parties engaged in motion practice resulting in Campos v. Western Dental
 3 Servs., 404 F.Supp.2d 1164 (N.D.Cal. 2005).

4 **6. The Experience and Views of Counsel**

5 Plaintiff Nancy Campos is represented by Ronald Wilcox and O. Randolph Bragg.
 6 Mr. Bragg has been in practice for 33 years, primarily in the area of consumer class action
 7 litigation. Mr. Wilcox has been in practice for ____ years; his practice includes bankruptcy and
 8 consumer litigation.

9 Defendants Western Dental Services, Inc. and Jennifer Roth are represented by
 10 Dan Marmalefsky and William L. Stern. Each has been in practice since 1980 and has substantial
 11 experience in the defense of consumer class action litigation.

12 Both counsel for Plaintiff and the proposed class and counsel for the Defendants
 13 believe that under the circumstances the proposed settlement is fair, reasonable, and adequate and
 14 recommend that the Court approve the settlement of this litigation.

15 **7. The Presence of a Governmental Participant**

16 No governmental entity is participating in this litigation.

17 **8. The Reaction of the Class Members to the Proposed Settlement**

18 Notice has not yet been sent to any of the class members. Therefore, there is no
 19 known reaction to this proposed settlement.

20 Upon consideration of the foregoing eight factors, the proposed settlement of this
 21 litigation is fair, reasonable, and adequate. The parties request the Court to approve the
 22 settlement of this class action.
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1 **V. CONCLUSION**

2 The parties request that the Court grant preliminary approval of the class action
3 settlement agreement. The agreement is fair, reasonable, and adequate to the parties and class
4 members.

5
6 I, William L. Stern, am the ECF user whose ID and password are being used to file this
7 Memorandum In Support of Joint Motion For Approval Of Class Settlement. In compliance with
8 General Order 45.X.B, I hereby attest that Ronald Wilcox has concurred in this filing.

9 Dated: July 7, 2006

10 WILLIAM L. STERN
11 DAN MARMALEFSKY
12 RITA F. LIN
13 MORRISON & FOERSTER LLP

14 By: //s//
15 William L. Stern

16 Attorneys for Defendants
17 WESTERN DENTAL SERVICES, INC.
18 and JENNIFER ROTH

19 Dated: July 7, 2006

20 RONALD WILCOX
21 O. RANDOLPH BRAGG
22 HORWITZ, HORWITZ & ASSOCIATES

23 By: //s//
24 Ronald Wilcox

25 Attorneys for Plaintiffs
26 NANCY CAMPOS
27
28